87-1201

No. .....

In The
Supreme Court of the United States
October Term, 1987

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,

Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Did the Petitioners' request for discretionary pre-judgment interest, which was made after a decision on the merits of their securities fraud claims, constitute a motion under Rule 59(e) of the Federal Rules of Civil Procedure which rendered their notice of appeal untimely pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure?

PARTIES

The following persons and entities were parties to the proceeding in the Court of Appeals: Myles Osterneck, Guy-Kenneth Osterneck, Myles and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (Plaintiffs-Appellants); E.T. Barwick Industries, Inc., M.E. Kellar, B.A. Talley (Defendants-Cross Appellants); Eugene Barwick, Ernst & Whinney (Defendants-Appellees).

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OPINIONS BELOW

The Court of Appeals' opinion sought to be reviewed, which is reported at 825 F.2d 1521, and additional orders of the Court of Appeals, which are not reported, appear in the Appendix. The Judgment entered on the merits in the District Court, the District Court's order deferring consideration of Petitioners' motion for prejudgment interest until after entry of judgment on the merits, the District Court's order granting prejudgment interest and the judgment adding prejudgment interest also appear in the Appendix, along with other relevant materials from the records in the courts below.

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JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Eleventh Circuit was entered on August 31, 1987. The Eleventh Circuit denied Petitioners' Suggestion of Rehearing In Banc and Petition for Rehearing on October 19, 1987. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

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FEDERAL RULES INVOLVED

Rule 59(e) of the Federal Rules of Civil Procedure:

"*Motion to alter or amend a judgment.*

A motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment."

Rule 4(a)(4) of the Federal Rules of Appellate Procedure:

"*Appeals in civil cases.*

. . .

4) If a timely motion under the Federal Rules of Civil Procedure is filed in the District Court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing."

———o———

STATEMENT OF THE CASE

This case arises out of the 1969 merger of Cavalier Bag Co. with E.T. Barwick Industries, Inc. Petitioners Myles Osterneck, et al. ("the Osternecks"), who owned Cavalier Bag Co. until that time, exchanged their stock in Cavalier for Barwick Industries stock. Sometime later the Osternecks became aware that the audited financial statements of Barwick Industries for the fiscal years 1968 through 1975 vastly overstated the financial condition of Barwick Industries. The Osternecks had relied on these financial statements and other representations in deciding to approve the merger and in deciding to purchase and

retain additional stock in Barwick Industries after the merger.

On September 4, 1975 the Osternecks filed this action alleging violations of §§ 10(b) and 20 of the Securities Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10(b)(5) thereunder (17 C.F.R. § 240 10b-5) and the common law of Georgia. In addition to Barwick Industries and several other individuals and organizations, the accounting firm of Ernst & Whinney ("E & W") was named as a defendant. E & W had not only prepared the inflated financial statements, but also had actively participated in the merger and had received a substantial fee from the Osternecks pursuant to the merger agreement. The Osternecks' claims against E & W were based on negligence as well as securities fraud.

Although the Osternecks' negligence claims against E & W were dismissed, apparently on the ground that no privity existed between E & W and the Osternecks, the Osternecks' securities fraud claims were tried before a jury almost ten years after the complaint was filed. After three and one-half months of trial, the jury returned a verdict against Barwick Industries and two individual defendants on the merits of the Osternecks' securities fraud claims. A verdict was returned in favor of E & W, however.

Immediately after the verdict was announced, the Osternecks orally requested that prejudgment interest be included in the judgment. The District Court held, however, that the question of prejudgment interest must be handled "separately" from the judgment on the merits and deferred ruling on the issue. Judgment was entered

on the jury verdict later the same day, January 30, 1985. Several days later, the Osternecks filed in writing their request for discretionary prejudgment interest on the amount awarded by the jury on the merits of their securities fraud claims. In addition, believing that the District Court erred in dismissing their negligence claims against E & W and in its rulings on certain evidentiary questions and jury charges, the Osternecks filed a notice of appeal on March 1, 1985.

In July 1985, the District Court granted the Osternecks' motion for prejudgment interest and entered an "Amended Judgment" directing that prejudgment interest be "added" to the earlier judgment. Although styled "Amended Judgment," the July 1985 judgment did not reconsider the merits or correct any errors in the January 30, 1985 judgment. To the contrary, the July 1985 order expressly provided that the January judgment would "remain the same" in every respect other than the addition of prejudgment interest to the amount awarded by the jury on the merits of the federal securities claim. *Id.*

Almost two months later, the Clerk of the Eleventh Circuit raised a question as to whether the Osternecks' motion for prejudgment interest should be considered a Rule 59(e) motion to alter or amend the judgment which would render the Osternecks' March 1, 1985 notice of appeal invalid. Prior to this time, no one involved in this case had ever considered the Osternecks' motion for prejudgment interest to be a Rule 59(e) motion which would invalidate all prior notices of appeal. For example, several parties to the appeal had stipulated in writing that the Osternecks' March 15, 1985 notice of cross appeal was

timely. The Clerk of the District Court had required the Osternecks to pay an additional filing fee for their notice of cross appeal filed after the District Court's award of prejudgment interest in July 1985 notwithstanding the provision in F.R.App.P. 4(a)(4) which provides that such an additional filing fee is not required when a new notice of appeal is filed after an order entered on a Rule 59(e) motion. E & W had filed its notice of appeal from the award of costs on the January 30 judgment in June 1985 and failed to renew the notice after the order awarding prejudgment interest as would have been required if the Osternecks' motion for prejudgment interest were a Rule 59(e) motion. The District Judge had treated the January 30, 1985 judgment as the *final* judgment notwithstanding the pending motion of a prejudgment interest when in May 1985 it denied as untimely E.T. Barwick's motion for an extension of time to file its bill of costs. Indeed, even in granting the motion for prejudgment interest, the District Judge continued to refer to the January 30, 1985 judgment as the "final" judgment.

The Osternecks filed a brief in the Eleventh Circuit on September 19, 1985 on the jurisdictional question. In an order dated October 30, 1985, the Eleventh Circuit held that "the jurisdictional issues are carried with the case." On August 31, 1987 the Court of Appeals held that a post judgment motion for discretionary prejudgment interest is a Rule 59(e) motion and dismissed the Osternecks' appeal as untimely pursuant to F.R.App.P. 4(a). Prior to its August 31, 1987 decision, the Eleventh Circuit had never before held that a motion for prejudgment interest constituted a Rule 59(e) motion.

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EXISTENCE OF JURISDICTION BELOW

The District Court had federal jurisdiction pursuant to 28 U.S.C. § 1331 as a result of the questions of federal law presented by the Osternecks' claims under the Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) and under Rule 10(b)(5) (17 C.F.R. § 240.10b-5).

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REASONS FOR GRANTING THE WRIT

The Supreme Court should grant certiorari in this case because the opinion of the Eleventh Circuit conflicts with the decisions of this Court and other Courts of Appeals regarding the scope of Rule 59(e), the nature of prejudgment interest and the nullification of notices of appeal.

Rule 59(e) of the Federal Rules of Civil Procedure provides:

> "*Motion to alter or amend a judgment.*
>
> A motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment."

A proper determination of whether a motion is a Rule 59(e) motion is imperative to the preservation of rights in the District Courts and Courts of Appeals. If a motion is considered a Rule 59(e) motion, it must be filed in District Court within ten days after the judgment. Moreover, if a motion is considered a Rule 59(e) motion, any notices of appeal filed while it is pending are ineffective under F.R. App.P. 4(a)(4)(iii).

Although seemingly a simple rule, Rule 59(e) has long caused great confusion and conflict in the Courts of Appeals. In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), the Supreme Court granted *certiorari* to resolve the conflict regarding the scope of Rule 59(e) in a case involving a motion for attorney's fees under 42 U.S.C. § 1988. Finding that Rule 59(e) is invoked "only to support reconsideration of matters encompassed in a decision on the merits," not to the initial granting of relief which is "collateral to the main cause of action," the Court held that a motion for attorney's fees pursuant to § 1988 does not constitute a Rule 59(e) motion. Significantly, in *White* the Supreme Court did not limit its inquiry to the history or nature of motions for attorney's fees. Rather, the Court dealt with the question by reviewing the purpose and scope of Rule 59(e) in general. Thus, the Supreme Court made it clear that Rule 59(e) does not apply to motions seeking relief which require "an inquiry that cannot commence until one party has 'prevailed.'" *Id.* at 451-452.

Despite the Supreme Court's clarification of Rule 59(e) in *White*, the Courts of Appeals have continued to divide over the proper application of Rule 59(e). For example, in *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 737 (9th Cir. 1986), cert. den'd. — U.S. —, 107 S.Ct. 324 (1986), the Ninth Circuit followed *White* to hold that a post judgment motion for discretionary prejudgment interest is *not* covered by Rule 59(e). The Eleventh Circuit in the present case, however, followed several decisions from other circuits which blindly relied on *pre-White* cases to hold that a post judgment motion for discretionary prejudgment interest *is* a Rule 59(e) motion. Thus, the Eleventh Cir-

cuit's opinion in the present case squarely conflicts with the Ninth Circuit's opinion in *Jenkins v. Whittaker Corp.*

Indeed, as demonstrated by the Ninth Circuit in *Jenkins*, the Eleventh Circuit opinion in the present case directly conflicts with the *White* definition of a Rule 59(e) motion:

> "Rule 59(e) was intended to deal with the correction of error, not the initial granting of relief." *See* 6A J. Moore, J. Lucas, and G. Grotheer, Moore's Federal Practice, Paragraph 59.03 2d.Ed. (1985). The Supreme Court described this role in *White v. New Hampshire Department of Employment Security*, . . . :
>
> > '[Rule 59(e)'s] draftsmen had a clear and narrow aim. According to the accompanying advisory committee report, the rule was adopted to 'make clear that the district court possesses the power' to *rectify its own mistakes* in the period immediately following the entry of judgment . . . Consistent with this original understanding, the federal courts generally have invoked Rule 59(e) only to support *reconsideration of matters properly encompassed in a decision on the merits* . . . By contrast, a request for attorney's fees under [42 U.S.C.] § 1988 raises legal issues *collateral to the main cause of action*—issues to which Rule 59(e) was never intended to apply.
> >
> > Section 1988 provides for awards of attorney's fees only to a 'prevailing party.' Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require *an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has prevailed.*' . . .
>
> . . . [A] prejudgment interest motion does not ask the court to reconsider or correct its own mistakes,

> because the court has not previously considered or decided the issue. The motion addresses an issue collateral to the main cause of action, requiring an inquiry unrelated to the merits that cannot be made until the moving party has 'prevailed' on the merits. Prejudgment interest compensates not for the *injury* giving rise to the action but for the *delay* between in jury and judgment. [cit.]. Both attorney's fees and prejudgment interest seek what is due because of the judgment, the former in terms of money expended, the latter in terms of time."

Jenkins, supra at 736-37, *quoting White, supra*, 455 U.S. at 450, 451 (emphasis original).

The Eleventh Circuit opinion in the present case also directly conflicts with holdings of this Court and other Courts of Appeals on discretionary prejudgment interest. In the present case, the Eleventh Circuit characterized discretionary prejudgment interest as a "substantive" right which is not collateral to the main cause of action. *Osterneck v. E.T. Barwick Industries*, 825 F.2d at 1525-26. The Supreme Court and other Courts of Appeals, however, have repeatedly held that discretionary prejudgment interest does not form the basis or substance of the main cause of action, but is only incidental thereto. *Eg. Stewart v. Barnes*, 153 U.S. 456, 462 (1894); *Girard Trust Co. v. United States*, 270 U.S. 163, 168 (1925); *Railroad Credit Corp. v. Hawkins*, 80 F.2d 818, 826 (4th Cir. 1936); *New York Trust Co. v. Detroit T & I Ry.*, 251 F.514 (6th Cir. 1918). Although these cases use the word "incidental" to describe discretionary prejudgment interest, "incidental" and "collateral" have frequently been used interchangeably in discussing whether a motion falls within Rule 59(e) under the *White* analysis. *See West v. Keve*, 721 F.2d 91,

95 (3rd Cir. 1983); *Bygott v. Leaseway Transport Co.*, 637 F.Supp. 1433, 1438 (E.D. Pa. 1986). *See also Swanson v. American Consumer Ind., Inc.*, 517 F.2d 555, 561 (7th Cir. 1975) (motion for attorneys fees was "incidental" to the main cause of action). The Eleventh Circuit's characterization of discretionary prejudgment interest as a substantive claim which is not collateral to the main cause of action, therefore, conflicts with the decisions of this Court and other federal courts which have long held that discretionary prejudgment interest is not a substantive right, but is only incidental, or collateral, to the main cause of action.

In addition to conflicting with the above cases, the Eleventh Circuit's approach to Rule 59(e) conflicts with that recently adopted by the Fifth Circuit in *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir. 1986) (en banc). In *Harcon Barge* the Fifth Circuit adopted a "bright line" test for determining whether a motion falls within the scope of Rule 59(e). Under the Fifth Circuit's "bright line" test, *any* motion *served* within ten days after the entry of the judgment will be treated as a Rule 59(e) motion regardless of whether the motion raises an issue collateral to the merits of the main cause of action. *Harcon Barge, supra,* at 667. Although urged by E & W to adopt the Fifth Circuit's "bright line" test, the Eleventh Circuit in the present case expressly declined to follow the Fifth Circuit approach. *Osterneck, supra,* at 1527, n.9. *See also C.I.T. v. Nelson,* 743 F.2d 774, 775 n.1 (11th Cir. 1984) (rejecting a similar bright line test because it conflicts with *White*).

As a result of the different approaches to Rule 59(e) now taken by the Fifth and Eleventh Circuits, the same

motion which is treated as a Rule 59(e) motion in one circuit is not treated as a Rule 59(e) motion in the other. For example, in *Harcon Barge, supra,* the Fifth Circuit held that a motion respecting costs which is filed and served within ten days after the entry of judgment *is* a Rule 59(e) motion. In the Eleventh Circuit, however, a motion respecting costs which is filed and served within ten days after judgment is *not* a Rule 59(e) motion. *Lucas v. Florida Power & Light Company,* 729 F.2d 1300 (11th Cir. 1984).

As shown by the Eleventh Circuit opinion in the present case, by the Ninth Circuit opinion in *Jenkins,* and by the Fifth Circuit opinion in *Harcon Barge,* there is a growing division among the Courts of Appeals regarding the proper application of Rule 59(e). All three of these decisions were rendered within the last two years, yet each decision conflicts with the other two. Accordingly, the Supreme Court should grant *certiorari* in this case to end the growing confusion and conflict among the federal Courts of Appeals on this issue. *See also Whittaker Corp. v. Jenkins,* — U.S. —, 107 S.Ct. 324 (1986) (dissenting op.) (even before the added conflict resulting from *Harcon Barge* and the present case, two Justices announced that the conflict among the circuits regarding the scope of Rule 59(e) should be resolved).

Moreover, the Supreme Court should review and reverse the Eleventh Circuit opinion in this case because the Eleventh Circuit opinion conflicts with this Court's holding in *Thompson v. Immigration and Naturalization Service,* 375 U.S. 384 (1964). *Thompson,* held that an appeal should not be dismissed as untimely where the appellant

relied on the statements of the District Court and the other parties in determining when to file its notice of appeal. Like the appellants in *Thompson*, the Osternecks relied on the statements and actions of the District Court and the other parties in determining when to file their notice of appeal. For example, the Osternecks' determination that the January 30, 1985 judgment was the final judgment on the merits for purposes of filing a notice of appeal was the result of the District Court's repeated characterization of the January 30, 1985 judgment as the *final* judgment notwithstanding the pendency of the motion for prejudgment interest, [App. 6-7, App. 13] and of the District Court's characterization of the motion for prejudgment interest as an issue "separate" from the judgment on the merits which was entered on January 31, 1985. [App. 2, 3]. The Osternecks' failure to treat their motion for prejudgment interest as a Rule 59(e) motion or to renew their March 1, 1985 notice of appeal was also based on the reassurance from the other parties that their March 15, 1985 notice of cross-appeal was timely [App. 50-51], on the fact that the clerk of the district court charged an additional filing fee for the notice of cross-appeal from the order granting prejudgment interest, an action which was incompatible with a characterization of the Osternecks' motion as a Rule 59(e) motion, and on the fact that no other party, even E & W, considered the Osternecks' motion to be a Rule 59(e) motion which would render all earlier notices of appeal ineffective. *See Osterneck, supra,* 825 F.2d at 1527, 1530. Indeed, until it rendered its opinion in the present case, the Eleventh Circuit had repeatedly indicated that a motion which, like a motion for discretionary prejudgment interest, merely seeks collateral relief

which is due because of a decision on the merits does *not* constitute a Rule 59(e) motion. *See Arceneaux v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 767 F.2d 1498 (11th Cir. 1985) (after discussing *White* with regard to a motion for attorneys fees, court affirmed discretionary award of prejudgment interest on a securities fraud claim pursuant to a motion which was not filed in compliance with Rule 59(e)); *Alimenta (U.S.A.), Inc. v. Anheuser-Busch Companies,* 803 F.2d 1160 (11th Cir. 1986) ("Rule 59(e) applies to motions for reconsideration of matters encompassed in a decision on the merits").

Because the present case involves unique circumstances similar to those in the *Thompson* case, the Eleventh Circuit erred in dismissing the Osternecks' appeal as untimely. Accordingly, this Court should grant *certiorari* in this case to correct this error and to promote the uniform application of the *Thompson* decision.

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CONCLUSION

This Court should grant *certiorari* to resolve the growing conflict among the circuits with regard to the scope of Rule 59(e), and to protect the crucial rights of appeal for litigants, such as the Osternecks, who must file a notice of appeal in a jurisdiction which has not yet either adopted the "bright line" rule of the Fifth Circuit or characterized every type of possible post judgment motion as being either within or beyond the scope of Rule 59(e).

Respectively submitted,

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INDEX TO APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-8165, 85-8523 & 85-8593

MYLES OSTERNECK, et al.,	Plaintiffs-Appellants, Cross-Appellees,
versus	
E.T. BARWICK INDUSTRIES,	Defendant-Appellee, Cross-Appellant,
E.T. BARWICK,	Defendant,
M.E. KELLAR,	Defendant-Appellee, Cross-Appellant,
BUFORD TALLEY,	Defendant-Appellee, Cross-Appellant,
ERNST & WHINNEY,	Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(Filed Oct. 30, 1985)

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

The jurisdictional questions are carried with the cases.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION
	)	
E. T. BARWICK INDUSTRIES, ET AL.,	)	NO. C75-1728A
	)	
Defendants.	)	

- VOLUME 54 -

Transcript of proceedings before The Honorable Horace T. Ward, United States District Judge, and a jury, at Atlanta, Fulton County, Georgia, commencing on October 16, 1984.

• • •

(Discussion in Open Court on January 30, 1985)

The Court: There's another matter that has to be brought to the court on this issue, that is, prejudgment interest on this particular verdict, but I am going to have to handle that separately and have it argued to me.

All right, we'll stand in recess, and just on that one point as to whether a mini-trial or resubmission of the matter to the jury on whether they would find that the issue was barred by a two-year statute of limitations. It will be one question if it's submitted.

You discuss it among yourselves and come back to my office and I will decide when I'm going to hear the prejudgment interest arguments.

We'll stand in recess for ten minutes.

[A short recess was had.]

The Court: All right. I will hear the motion concerning prejudgment interest. I know it's going to be offered from the plaintiffs. Just state on the record that you are going to move for prejudgment interest.

Mr. Webb: Yes, Your Honor, we are. We do move for prejudgment interest in favor of the plaintiffs against the defendants against whom the verdicts were returned.

The Court: In view of the fact that I do not wish to have it argued right now and based on the request of the lawyers, I will allow it to be submitted in writing.

The plaintiffs will have ten days to present to the judge the plaintiffs' position on prejudgment interest and the affected defendants will have ten days thereafter, after they receive a copy of the brief and submission of the plaintiffs, to respond and then the judge will rule on it.

The judge will direct the clerk to issue a judgment on the verdict and I don't think—I think it can be done without having to have the lawyers submit proposed judgments. Sometimes you have to do that, but I think it can be figured out, Ms. Daniels. If you need any assistance you can talk to the judge.

The judgment will be entered on this particular verdict as soon as possible, then if prejudgment interest is granted it will be—the judgment can be amended.

• • •

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK,

Plaintiffs

CIVIL ACTION

NO. C75-1728A

VS

E. T. BARWICK INDUSTRIES, INC., E. T. BARWICK, M. E. KELLAR, B. A. TALLEY AND ERNST & WHINNEY

Defendants

JUDGMENT

This action came before the Court and a jury, Honorable Horace T. Ward, U. S. District Judge, presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the plaintiffs and against the defendants E. T. BARWICK INDUSTRIES, INC., M. E. KELLAR and B. A. TALLEY on the Federal Securities Claim and the State Common Law Claim in the amount of TWO MILLION, SIX HUNDRED THIRTY-TWO THOUSAND, TWO HUNDRED THIRTY-FOUR & 00/100 dollars. ($2,632,234.00) as compensatory damages, with interest thereon at the rate of 9.09% as provided by law, and their costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered in favor of defendant E. T. BARWICK and against the plaintiffs on the Federal Securities Claim and the State Common Law Claim and that the defendant E. T. BARWICK recover of the plaintiffs his costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered in favor of the defendant ERNST & WHINNEY and against the plaintiffs on the Federal Securities Claim and that defendant ERNST & WHINNEY recover of the plaintiffs its costs of action.

Dated at Atlanta, Georgia, this 30th day of January, 1985.

FILED & ENTERED IN CLERK'S OFFICE
THIS 30TH DAY OF JANUARY, 1985
BEN H. CARTER, CLERK

By: Patsy L. Daniels
Deputy Clerk

BEN H. CARTER, CLERK
/s/ Patsy L. Daniels
Patsy L. Daniels
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al., Plaintiffs	)	CIVIL ACTION
vs.	)	FILE NO. C75-1728A
E.T. BARWICK INDUSTRIES, INC., et al., Defendants	)	

ORDER OF COURT

(Filed May 1, 1985)

On January 30, 1985, a judgment was entered in favor of defendant E. T. Barwick. On March 25, 1985, defendant Barwick filed a motion for extension of time to file his bill of costs. Barwick requests that the court extend the time for filing his bill of costs up to and including May 1, 1985.

Plaintiffs oppose said motion. Plaintiffs point out that Local Rule 255-7 provides:

> A bill of costs must be filed by the prevailing party within 30 days after the entry of judgment. A bill of costs which is not timely filed will result in costs not being taxed as a part of the judgment.

Local rules of practice, such as Rule 255-7, "have the force and effect of law, and are binding upon the parties and the court which promulgated them until they are changed in the appropriate manner." *Woods Construction Co., Inc. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888, 890 (10th Cir. 1964) (citations omitted).

Defendant Barwick's motion was filed 24 days after the date on which the bill of costs "must" have been filed. Additionally, Barwick did not seek an extension of time for compliance with Rule 255-7 until well after the date upon which the bill of costs was to have been filed. There is no doubt that Barwick failed to comply with the requirements of Local Rule 255-7. The time period established by Local Rule 255-7 is designed to provide a time limit for the conclusion of litigation in the trial court, is necessary for the orderly administration of cases, and is binding upon the parties. *In re Pin Oaks Apartments, Alleged Partnership*, 14 B.R. 16, 17 (S.D.Tex. 1981); *Woods Construction Co., Inc.*, 337 F.2d at 891. *Compare J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 102 F.R.D. 73, 77 (E.D.La. 1984) (untimely bill of costs permitted where case "not governed by any local rule").

Accordingly, defendant E. T. Barwick's motion for extension of time to file his bill of costs is hereby DENIED.[1]

SO ORDERED, this 29th day of April, 1986.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT
JUDGE

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[1] Plaintiffs were granted an extension of time to file their bill of costs in this action. However, said extension was granted pursuant to a consent motion and order which was filed prior to the expiration of the thirty-day limit set forth in Rule 255-7. Both of these facts distinguish the court's ruling with respect to plaintiffs' motion from the court's ruling as set forth hereinabove.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al., Plaintiffs	)	CIVIL ACTION
vs.	)	
E.T. BARWICK INDUSTRIES INC., et al., Defendants.	)	FILE NO. C75-1728A

ORDER OF COURT

(Filed July 1, 1985)

On January 30, 1985, a judgment in the amount of $2,632,234.00 was entered in favor of the plaintiffs and against defendants E. T. Barwick Industries, Inc., M. E. Kellar, and B. A. Talley on federal securities law claims and state common law claims. At that time the plaintiffs requested that the court add prejudgment interest to that amount. The court deferred ruling on the matter of prejudgment interest and directed the parties to brief the issue. The parties have briefed the issue of prejudgment interest, and the court is now prepared to issue its ruling on plaintiffs' motion for award of prejudgment interest.

Defendants oppose plaintiffs' request for prejudgment interest, and in the alternative, argue that if it is allowed, any amount awarded should be less than the amount claimed by the plaintiff. Defendants further argue that whether prejudgment interest should be awarded should be determined by reference to Georgia law. It is

clear that "[i]n determining whether prejudgment interest is allowed on damages pursuant to Rule 10b-5, federal law governs." *Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), *reh'g denied*, 478 F.2d 1403, *cert. denied*, 414 U.S. 975, *reh'g denied*, 414 U.S. 1104 (1973). *See also Alley v. Miramon*, 614 F.2d 1372, 1381 n.18 (5th Cir. 1980); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 560 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 103 S.Ct. 683 (1983); *Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith*, 595 F. Supp. 171, 172 (M.D.Fla. 1984). It is also clear that "whether prejudgment interest should be awarded on a damage recovery in a Rule 10b-5 action is a question of fairness resting within the District Court's sound discretion." *Wolf v. Frank*, 477 F.2d at 479.[1] Defendants' reliance on *United States ex rel. Georgia Electrical Supply v. U.S. Fidelity & Guaranty Co.*, 656 F.2d 993 (5th Cir. 1981), and other cases which suggest that state law (and the interest-on-liquidated-damages-only rule) provides the standard by which prejudgment interest should be awarded, is misplaced as those cases did not arise in the context of federal securities law violations but involved other federal statutes and causes of action thereunder.

Plaintiffs contend that the interest should be calculated for the period September 8, 1969 to January 30, 1985 (date of merger to date of judgment). The plaintiffs have suggested ten alternative rates at which prejudgment in-

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[1] As to the state law claims, however, Georgia law governs. *George R. Hall, Inc. v. Superior Trucking Company, Inc.*, 532 F. Supp. 985, 998 (N.D.Ga. 1982). In the instant case, involving unliquidated damages, prejudgment interest on a state law claim is precluded by Georgia law. *See* O.C.G.A. § 51-12-14.

terest might be calculated. This is a matter about which there has been considerable discussion. "Most cases do not explain the reason for use of a particular interest rate, but merely adopt the state interest rate without further discussion." Jacobs, *The Measure of Damages in Rule 10b-5 Cases,* 65 Georgetown L.Rev. 1093, 1161 (1977). Further, the cases show a wide range in the amount of interest awarded. *Id.* at 1161 n. 369. The alternative interest rates presented by the plaintiffs would result in prejudgment interest calculations ranging from a low of $2,836,536.63 (7% simple interest) to a high of $7,580,099.59 (three-month certificates of deposits compounded). *See* Appendix A attached thereto.

As stated in *Wolf v. Frank, supra,* the matter as to whether or not to award prejudgment interest in a federal securities fraud case rests in the sound discretion of the district court, and any ruling on the issue should be based upon fundamental considerations of fairness. An award of prejudgment interest is a part of compensatory damages, but the compensatory nature of such an award must be "tempered by an assessment of the equities." *Norte & Co. v. Huffines,* 416 F.2d 1189, 1191 (2nd Cir. 1969). In awarding prejudgment interest, the district court must take care to determine that such an award is not punitive in nature. *See Chris-Craft Industries, Inc. v. Piper Aircraft Corp.,* 516 F.2d 172 (2nd Cir. 1975).

The court has determined that upon a consideration of the facts and circumstances herein involved that an award

of prejudgment interest in this case is in order,[2] but in an amount considerably less than that claimed by the plaintiffs. The court further concludes that any award of prejudgment interest in an amount in excess of the jury award of damages or for the full period claimed (approximately fifteen years) would be *punitive* rather than compensatory. In the first instance, much of the delay in getting this case in a posture where it could be presented to a jury can be attributed to the plaintiffs. There was some delay on the part of the plaintiffs in filing the law suit after they were put on notice that a cause of action existed. Also, the lawsuit was pending for a period of nine years from the filing to the beginning of the trial. A substantial part of the delay can be attributed to the actions or lack of action on the part of the plaintiffs. It should be noted that the plaintiffs changed lead counsel two times after the original lead counsel withdrew from the case. This is not to say that other delay was not caused by action or failure to act by various defendants. There are also examples of delay in the progress of bringing this case to trial which were agreed upon by the parties. There was tacit agreement between the parties that action of the district court on certain motions be stayed for a period of time pending a ruling by the Court of Appeals on an issue important to this case. Another matter which contributed to some delay is the fact, that due to changes in

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[2] In an effort to make a party whole, an award of prejudgment interest is particularly appropriate in cases involving investment fraud and breach of fiduciary duties. *See Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith,* 595 F. Supp. 171, 174 (M.D.Fla. 1984) and the cases cited therein at p. 174.

judicial personnel in this district, this case has been assigned to five different district judges at various times.

The court agrees with the plaintiffs that the overall period of time involved in any interest calculation is from September 8, 1969 to January 30, 1985 (date of merger to date of judgment).

Upon giving due consideration to the ten alternate rates of interest presented by the plaintiffs, the court is persuaded that only the use of the constant 7% (simple) interest rate would be fair and reasonable in this case, given the protracted period of time involved.[3] In effect, the court has determined that the Georgia statutory rate is more appropriate than the other rates suggested by the plaintiffs. *See* O.C.G.A. § 7-4-2. In order that the award of prejudgment interest in this case not be deemed to be punitive in nature, the court further determines that an award of only one-third of the total amount arrived at by applying the interest rate of 7% to the jury award for the full period of time may be recovered. Accordingly, the plaintiffs are entitled to recover as prejudgment interest on the federal securities claim in the amount of $945,-512.85. Due to the unliquidated nature of plaintiffs' claims, the plaintiffs are not entitled to recover prejudgment interest on the amount awarded under the Georgia common law fraud claim.

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[3] In making the ruling hereinabove as to the rate interest to be applied in this case, the court is not unmindful of the cases cited in Part III of plaintiffs' brief, such as *Johns Hopkins University* v. *Hutton*, 297 F. Supp. 1165 (D.Md. 1968) and like cases. The court has simply determined that the average money market approach is not appropriate in this case.

It is hereby ORDERED and ADJUDGED that plaintiffs shall recover of defendants E. T. Barwick Industries, Inc., M. E. Kellar, and B. A. Talley an award of prejudgment interest in the amount of Nine Hundred Forty-Five Thousand Five Hundred Twelve Dollars and Eighty-Five Cents ($945,512.85). Therefore, final judgment in this case shall be AMENDED to reflect this additional award of prejudgment interest on the federal securities claim.

SO ORDERED, this 12th day of July, 1985.

/s/ Horace T. Ward
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MILES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK,	)	
Plaintiffs,	)	CIVIL ACTION NO. C75-1728A
vs.	)	
E.T. BARWICK INDUSTRIES, INC., E.T. BARWICK, M.E. KELLAR, B.A. TALLEY and ERNEST AND ERNEST,	)	
Defendants.	)	

AMENDED JUDGMENT

The judgment heretofore entered in the above-stated case on January 30, 1985, is hereby amended by adding thereto "that plaintiffs, MILES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK, shall recover of defendants, E. T. BARWICK INDUSTRIES, INC., M. E. KELLAR, and B. A. TALLEY an award of prejudgment interest in the amount of NINE HUNDRED FORTY-FIVE THOUSAND FIVE HUNDRED TWELVE and 85/100 DOLLARS ($945,512.85) on the federal securities claim", and that said judgment remain the same in every other respect.

Dated at Atlanta, Georgia, this 9th day of July, 1985.

FILED AND ENTERED
IN CLERK'S OFFICE
JULY 9, 1985
LUTHER D. THOMAS, Clerk
By /s/ B. D. Hatcher
Deputy Clerk

LUTHER D. THOMAS, Clerk
By: /s/ Barbara D. Hatcher
Deputy Clerk

Myles OSTERNECK, et al.,
Plaintiffs-Appellees,

v.

E.T. BARWICK INDUSTRIES, INC., et al.,
Defendants.

Ernst & Whinney, Defendant-Appellant.

Myles OSTERNECK, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

E.T. BARWICK INDUSTRIES, INC., et al.,
Defendants,

Melvin E. Kellar and Buford A. Talley,
Defendants-Appellants, Cross-Appellees.

Myles OSTERNECK, et al.,
Plaintiffs-Appellants,
Cross-Appellees,

v.

E.T. BARWICK INDUSTRIES, INC.,
Defendant.

E.T. Barwick, Defendants,

M.E. Kellar, Defendant-Appellant,
Cross-Appellee,

Buford Talley, Defendant-Appellant,
Cross-Appellant.

Ernst & Whinney, Defendant-Appellee,
Cross-Appellant.

Nos. 85-8523, 85-8593 and 85-8165.

United States Court of Appeals,
Eleventh Circuit.

Aug. 31, 1987.

Appeals from the United States District Court for the Northern District of Georgia.

Before HATCHETT and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

ANDERSON, Circuit Judge:

Over seventeen years ago, in September 1969, Cavalier Bag Company, Inc., merged into E.T. Barwick Industries, a subsidiary of the Barwick Corporation. Various members of the Osterneck family, plaintiffs in this action, were, at that time, owners of Cavalier. Pursuant to the merger, the Osternecks exchanged their stock in Cavalier for Barwick Industries stock.

Sometime later the Osternecks became aware of allegedly frudulent misrepresentations made to them in order to secure their approval of the merger. Specifically, they came to believe that Barwick Industries' financial statements for the two years preceding the merger misrepresented the company's financial condition. Consequently, on September 4, 1975, the Osternecks began this action alleging violations of §§ 10(b) and 20 of the Securities Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10(b)(5) thereunder (17 C.F.R. § 240.10b-5) and the common law of Georgia.

Besides Barwick Industries, the Osternecks named as defendants several other individuals and organizations. Of these only four remain parties to this appeal: E.T. Barwick, B.A. Talley, and M.E. Kellar, who were directors and officers of Barwick Industries prior to or during the merger and Ernst & Whinney ("E & W"), the accountants responsible for preparing the allegedly fraudulent statements misrepresenting the financial condition of Barwick Industries.[1]

Following almost ten years of discovery, this case finally went to trial in October, 1984. After three and a

1. The financial statements were actually prepared by Ernst & Ernst. Since that time, however, the accounting firm has changed its name to Ernst & Whinney.

half months of testimony, the jury returned a verdict against defendants Barwick Industries, M.E. Kellar, and B.A. Talley in the amount of $2,632,234 as compensatory damages for violations of federal securities law and Georgia state common law. Judgment was entered in favor of E & W and E.T. Barwick, individually. Subsequently, the district court awarded the Osternecks pre-judgment interest on their federal securities claim in the amount of $945,512.85. These consolidated appeals ensued.

Tangled procedural maneuvering has created three separate appellate cases. For clarity's sake we briefly characterize them here: Case No. 85-8165 involves the Osternecks' appeal from all judgments rendered against them and includes the cross-appeals of most of the defendants. Case No. 85-8593 involves only the appeal by Barwick Industries, E.T. Barwick, Talley and Kellar and the Osternecks' cross-appeal against those parties. Case No. 85-8523 is an appeal by E & W from the district court's denial of expert fees in E & W's bill of costs.

I. JURISDICTION

As an initial matter, we confront several difficult jurisdictional questions. These difficulties arise out of the complicated procedural maneuvering which occurred following the initial entry of judgment against defendants Barwick Industries, Kellar and Talley. This first judgment for over two and a half million dollars was entered on January 30, 1985. At that time the Osternecks moved orally for the award of pre-judgment interest. On February 11, 1985, the Osternecks filed a written motion for prejudgment interest. During March 1985, the various parties filed notices of appeal and cross-appeal chal-

lenging the Janaury 30, 1985 judgment, including the Osternecks' March 1, 1985 notice of appeal.[2] It was not, however, until July 1 that the district court entered an order ruling upon the Osternecks' February 11 motion and awarding the Osternecks over $945,000 in prejudgment interest. A separate judgment, captioned as an "amended judgment," was entered on July 9. Following this amended judgment various notices of appeal and cross-appeal were filed. The Osternecks' filed only a single notice of appeal on July 31, 1985, which was captioned as a cross-appeal against Kellar, Talley, E.T. Barwick and Barwick Industries. The notice did not designate E & W as a party to the appeal.[3]

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2. In addition to the Osternecks' notice of appeal, Talley and Kellar also filed notices of appeal on March 1, 1985. On March 15, E & W filed a cross-appeal against the Osternecks and the Osternecks cross-appealed against Talley and Kellar. On March 28, the Osternecks cross-appealed against Barwick Industries.

3. In full, the notice of appeal read:

> NOTICE OF CROSS-APPEAL AGAINST M.E. KELLAR, BUFORD A. TALLEY, E.T. BARWICK INDUSTRIES, INC., AND E.T. BARWICK FROM THAT PORTION OF THE COURT'S ORDERS AND AMENDED JUDGMENT WHICH PROVIDE THE PREJUDGMENT INTEREST AND COSTS AWARDED TO PLAINTIFFS
>
> NOTICE IS HEREBY GIVEN that Myles Osterneck, Guy Kenneth Osterneck, and Robert Osterneck, and Myles Osterneck and Guy Kenneth Osterneck as Trustees for the benefit of Robert Osterneck, Plaintiffs in the above-styled action, hereby cross-appeal against M.E. Kellar, Buford A. Talley, E.T. Barwick Industries, Inc. and E.T. Barwick to the United States Court of Appeals for the Eleventh Circuit, from the portions of the Court's orders dated July 1, 1985 which provide the interest and costs awarded to Plaintiffs regarding Plaintiffs' Motion for Prejudgment Interest and

(Continued on following page)

A. *Cases Nos. 85-8165 & 85-8593*

These cases raise two interrelated jurisdictional issues. First, we must examine the effect and validity of the Osternecks' March 1, 1985 notice of appeal, and the other appeals and cross-appeals filed by the defendants during March 1985. The parties agree that if these notices were effective they would be sufficient to raise all issues the Osternecks seek to litigate on appeal. However, defendants Talley, Kellar, and E & W contend that these notices were ineffective because they were filed while a Rule 59(e) motion was pending before the district court. If the Osternecks' March 1, 1985 notice of appeal, and the other appeals and crossappeals filed in March 1985 are deemed ineffective, we must next decide whether the Osternecks' second notice of appeal filed on July 31, 1985, effectively preserved all issues for appeal.[4] Defendants Talley, Kellar, and E & W argue that this second notice of appeal did not preserve all the issues which the Osternecks now seek to litigate.[5]

(Continued from previous page)

> Bill of Costs, from that portion of the Amended Judgment filed and entered on July 9, 1985 which provides the prejudgment interest awarded to Plaintiffs and from all previous non-final or interelocutory orders and all rulings which produced and preceded these Orders and Judgments.
>
> This 31 day of July, 1985.

Record on Appeal, vol. 24, Tab 511.

4. It is uncontested that the appellants Barwick Industries, E.T. Barwick, Talley and Kellar filed effective, timely second notices thereby preserving their appeals. As will appear below, however, E & W has foregone its right to appeal.

5. The Osternecks argue that the defendants are estopped to deny this court's jurisdiction, having originally conceded that jurisdiction for this appeal existed. However, it is well settled

(Continued on following page)

It is settled law that a notice of appeal filed while a motion to alter or amend the judgment under Rule 59(e) is pending can have no effect. *See* Fed.R.App.P. 4(a)(4);[6] *see also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); *Robinson v. Tanner*, 798 F.2d 1378, 1385 (11th Cir.1986). Thus, the jurisdictional question posed by this case is a clear one: should the Osternecks' February 11 motion for prejudgment interest be characterized as a motion, pursuant to Fed.R.Civ.P. 59(e), to alter or amend the district court's judgment. Because we conclude that this motion for discretionary prejdugment interest is properly characterized as a motion to alter or amend a final judgment of the district court, all notices filed in this case prior to the ruling on that motion, i.e., July 9, 1985, have no effect.

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that, as courts of limited jurisdiction, federal courts are obliged to undertake a jurisdictional inquiry whenever it appears that, in fact, no jurisdiction exists. *Blake v. Zant*, 737 F.2d 925, 926 (11th Cir.1984), *on reh'g*, 758 F.2d 523, *cert. denied*, — U.S. —, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir.1981). Thus, any prior stipulation by the parties notwithstanding, the issue of our jurisdiction is now before us and must be addressed.

6. In relevant part, this rule reads:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 . . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying . . . such motion. A notice of appeal filed before the disposition of [a Rule 59 motion] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion. . . .

Fed.R.App.P. 4(a)(4).

Our conclusion that a motion for prejudgment interest is a Rule 59(e) motion is influenced by several factors. First and foremost amongst these is the settled treatment of such motions by the other circuit courts of appeal They have uniformly concluded that a motion for discretionary prejudgment interest must be filed pursuant to Rule 59(e). *See Stern v. Shouldice*, 706 F.2d 742, 746-47 (6th Cir.), *cert. denied*, 464 U.S. 993, 104 S.Ct. 487, 78 L.Ed.2d 683 (1983); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45-47 (2d Cir.1982); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 152-54 (1st Cir.1980).

This result may be easily explained. The discretionary award of prejudgment interest requires the district court to substantively reconsider its original judgment. This is precisely the sort of alteration or amendment contemplated by Rule 59(e). Such substantive modifications must be sought within ten days of the entry of judgment[7] and any decision rendered prior to disposition of the motion is not final for purposes of appeal. The rules of appellate procedure are designed to prevent precisely what has occrured in this case—the piecemeal appeal of non-final substantive judgments rendered by the district court.[8]

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7. The Osternecks' motion, served on February 11, 1985, was served within the ten-day time limit prescribed by Fed.R.Civ.P. 59(e). The tenth day after judgment actually fell on Saturday, February 9, and an extension until Monday was proper. Fed. R.Civ.P. 6(a).

8. One narrow exception to the general rule that motions for prejudgment interest should be treated under Rule 59(e) may exist. When the substantive law upon which the district court's judgment is based mandates an award of prejudgment

(Continued on following page)

The Osternecks argue, however, that their motion is not within the scope of Rule 59(e) because it addresses an issue collateral to the main cause of action. As support for this proposition, they cite *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), in which the Supreme Court held that a post-judgment motion for an award of attorney's fees under 42 U.S.C. § 1988 was not governed by Rule 59(e).

Reliance upon *White* is misplaced. In *White*, the Court noted that an award of attorney's fees under § 1988 is "uniquely separable" from the main cause of action and, " 'does not imply a change in the judgment.' " *Id.* at 452, 102 S.Ct. at 1166 (quoting *Knighton v. Watkins*, 616

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interest, its omission from the judgment may be corrected as a clerical error by motion brought pursuant to Fed.R.Civ.P. 60(a). *See Glick v. White Motor Co.*, 458 F.2d 1287, 1293-94 (3d Cir.1972). The discretionary award of prejudgment interest can never fall within this exception. *See Goodman*, 682 F.2d at 45-46; *Scola*, 618 F.2d at 153. As the Osternecks have conceded, the award of prejudgment interest in this case was wholly within the district court's discretion. Neither the federal securities law nor the state common law fraud claims litigated by the Osternecks mandated the award of prejudgment interest. *See, e.g., Blau v. Lehman*, 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed.2d 403 (1962); *Hembree v. Georgia Power Co.*, 637 F.2d 423, 429-30 (5th Cir.1981). Moreover, to the extent that any such exception to the general rule exists, the former Fifth Circuit has, in dicta, rejected this exception. *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1213 n. 4 (5th Cir.1976) ("To the degree these cases hold that interest which is added as a matter of right can always be corrected under Rule 60(a), we believe they should be rejected.") (binding precedent, *see infra* note 10). Of course, when an improper legal rate of interest is set by the district court, a party may also seek relief from the legally erroneous judgment under Rule 60(b). *Id.* at 1212-13.

F.2d 795, 797 (5th Cir.1980)). Our circuit has interpreted this to mean that Rule 59(e) applies only when a motion seeks reconsideration of substantive issues resolved in the judgment and not when a motion raises exclusively collateral questions regarding what is due because of the judgment. *See Lucas v. Florida Power & Light Co.*, 729 F.2d 1300, 1301 (11th Cir.1984). Thus, we have even concluded that the issue of attorney's fees is not always collateral to the action. When the liability for the award arises from a substantive contractual obligation and is "an integral part of the merits of the case" and therefore " 'compensation for the injury giving rise to an action,' " a motion for the inclusion of attorney's fees is a Rule 59(e) motion and tolls the time period for appeal. *C.I.T. Corp. v. Nelson*, 743 F.2d 774, 775 (11th Cir.1984) (quoting *White*, 455 U.S. at 452, 102 S.Ct. at 1166-67); *accord Beckwith Machinery Co. v. Travelers Indemnity Co.*, 815 F.2d 286 (3d Cir.1987). *But see Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 282-94 (7th Cir.1985).

It cannot be doubted that prejudgment interest is compensation which directly stems from the injury giving rise to the action. *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191 (2d Cir.1969); *cert. denied*, 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970). Thus, a motion to award prejudgment interest requests a substantive alteration of a court's judgment and must be made pursuant to Rule 59(e). Hence, in the instant case, the district court's judgment was not made final until the entry of its

amended judgment on July 9, 1985, and all notices of appeal filed prior to that date were ineffective.[9]

In order to avoid the effects of this ruling, the Osternecks argue that their original notices of appeal and cross-appeal filed in March are, nonetheless, effective because they fall within the scope of two special exceptions which validate premature notices of appeal. First, they argue that an interlocutory appeal from a nonfinal decision may, nonetheless, be treated as an appeal from a final order if the nonfinal judgment has subsequently been finalized. *See Jetco Electric Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir.1973);[10] *cf. Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980). However, *Jetco* holds only that a "premature notice of appeal is valid if filed from an order dismissing a claim or party and followed by a subsequent final judgment without a new notice of appeal being filed. *Robinson*, 798 F.2d at 1385 (footnote omitted). In this case, the earlier nonfinal order was not one which dismissed a

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9. As an alternative to this resolution, E & W urges us to adopt the per se rule recently announced by the Fifth Circuit in *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir.) (en banc), *cert. denied*, — U.S. —, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). That court concluded that any post-judgment motion served within ten days of the entry of judgment (except a motion to correct purely clerical errors under Rule 60(a)) would be treated as a motion under Rule 59(e). *Id.* at 667. Absent en banc reconsideration by our own court, we are not free to adopt this bright line rule. Moreover, our own distinction between collateral and noncollateral matters is sufficient for the purpose at hand and achieves the same result as that suggested by *Horcan's* per se rule.

10. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

claim or a party. Rather, it only rendered judgment upon a jury verdict. Thus, the Osternecks' premature appeal does not fall within the scope of the *Jetco* rule. Moreover, in *Martin v. Campbell*, 692 F.2d 112, 114-16 (11th Cir. 1982), this court determined that *Jetco* could not validate a premature notice of appeal which was filed while a Rule 59 motion was pending. We concluded that Fed.R.App.P. 4(a)(4) spoke directly to the validity of such appeals and precluded validation of a premature notice under *Jetco's* equitable exception.

As a final argument, the Osternecks contend that they fall within the "unique circumstances" exception to the timely appeal requirement. This exception, developed by the Supreme Court in *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964) (per curiam), commands that an appellate court "should hear an appeal even though it is not timely, if the appellant reasonably relied on an erroneous statement of the district court that the appeal . . . was timely, and the appeal would have been timely if the district court had been correct." *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 n. 2 (7th Cir. 1985) (citation omitted).

The Osternecks contend that they have relied upon several actions of the district court which indicated that the January 30, 1985 judgment was final and appealable. These include the district court's subsequent orders granting E & W's bill of costs, denying E.T. Barwick's motion for an extension of time to file its bill of costs, and denying E.T. Barwick Industries' motion to stay the executions of the January 30 judgment. In addition, the clerk of the district court required the Osternecks to pay an additional filing fee for their notice of cross-appeal filed after the

district court's July 9 amended judgment. The Osternecks argue that this requirement indicates that the clerk did not treat the Osternecks' motion for prejudgment interest as a motion under Rule 59. Had the clerk believed that a Rule 59 motion had been made he would have acted pursuant to Fed.R.App.P. 4(a)(4) which provides that no additional fees shall be required for a second notice of appeal filed after a Rule 59 motion has been ruled upon. Finally, the Osternecks contend that they relied upon this court's failure to originally notify them that jurisdiction was questionable.

We do not believe that any of these factors are sufficient to create the "unique circumstances" necessary to validate a premature appeal. At no time has the district court or this court every affirmatively represented to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such an assurance from either court. Indeed, the *Thompson* exception is designed to permit an appeal when a party has done an act which, if properly done, would postpone the deadline for filing his appeal and has been assured by a judicial officer that this act has been properly done. *Thompson*, 375 U.S. at 387. The Osternecks do not suggest that any court officer has ever assured them that they have been granted an extension of time within which to file an appeal.[11]

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11. Moreover, to the extent the Osternecks may have erroneously relied upon the actions of the district court, they did so despite the district court's express statements that the judgment would have to be "amended" to include prejudgment interest. See Record on Appeal, vol. 82 at 8497 ("if prejudgment interest is granted it will be—the judgment can be amended"); *cf. id.* vol. 24, Tab 508 (entering "amended judgment" awarding prejudgment interest). Rule 59(e) is, of course, the only vehicle by which prior district court judgments may be "amended."

For the foregoing reasons, we conclude that we do not have jurisdiction to hear the appeal in Case No. 85-8165 (i.e., the Osternecks' March 1, 1985 appeal and the defendants' cross-appeal during March 1985). That appeal is accordingly ordered dismissed.[12]

Having concluded that all of the notices of appeal filed prior to the district court's amended judgment on July 9, 1985 are ineffective, we must next determine the efficacy of the Osternecks' subsequent notice of cross-appeal filed on July 31, 1985. The Osternecks contend that, even though their appeal in Case No. 85-8165 may be dismissed, all the issues they seek to litigate in that ap-

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12. In an effort to resuscitate their appeal, the Osternecks have made several motions. First, they seem to have requested that we order the district court to grant them an extension of time in which to file their appeal. Though the district court may entertain such a motion, an appellate court is expressly prohibited from enlarging the time for filing a notice of appeal. Fed.R.App.P. 26(b). In the alternative the Osternecks' motion may be construed as a request that this court stay its hand and permit a limited remand so that the district court may determine whether an extension of time is appropriate. This we decline to do. The need for the orderly disposition of appeals indicates that such limited remands are strongly disfavored and the Osternecks have suggested no reason why the district court could not as readily deal with a motion for an extension following our dismissal of the instant appeal. Indeed, there is currently pending before the district court a motion for an extension of time in which to file an appeal. The district court has deferred ruling on this motion pending our disposition of this appeal. *United States v. Hitchmon*, 602 F.2d 689, 692 (5th Cir.1979). Following this dismissal, the district court may entertain the Osternecks' motion. The grant or denial of such a motion is entrusted to the district court's sound discretion. *Wansor v. George Hantscho Co.*, 570 F.2d 1202, 1205-07 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 350, 58 L.Ed.2d 344 (1978); *In re O.P.M. Leasing Services*, 769 F.2d 911 (2d Cir.1985).

peal are preserved for litigation in Case No. 85-8593 by their July 31 notice. By its terms, however, this notice of cross-appeal does not expressly raise any issues for appeal against E & W. E & W contends that the failure to name them in the notice of appeal renders the notice ineffective insofar as it seeks to raise any issues on appeal against E & W. We agree.

The general rule in this circuit is that an appellate court has jurisdiction to review only those judgments, orders or portions thereof which are specified in an appellant's notice of appeal. *See Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374-75 (11th Cir.); *cert. denied*, 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983); Fed.R.App.P. 3(c) (requiring that a notice of appeal "designate the judgment, order or part thereof appealed from"). *But see Lynn v. Sheet Metal Workers*, 804 F.2d 1472, 1481 (9th Cir.1986). Although we generally construe a notice of appeal liberally, we will not expand it to include judgments and orders not specified unless the overriding intent to appeal these orders is readily apparent on the face of the notice. We have previously concluded that, where some portions of a judgment and some orders are expressly made a part of the appeal, we must infer that the appelllant did not intend to appeal other unmentioned orders or judgments. *Mestre*, 701 F.2d at 1374-75; *see also C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1055-56 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 974, 71 L.Ed.2d 112 (1981).[13]

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13. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

We conclude that an analogous rule would apply when an appellant expressly names some of his opponents but fails to include other opposing parties within the notice of appeal. *See Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252 (3d Cir.1977) (depriving appellate jurisdiction with respect to defendants not named in notice of appeal); *Parrish v. Board of Commissioners*, 505 F.2d 12, 15-16 (5th Cir.1974) (notice naming appellants "PARRISH, ET AL., Plaintiffs" sufficient to demonstrate that all plaintiffs intended to appeal), *vacated*, 509 F.2d 540, *reh'g en banc*, 524 F.2d 98 (1975), on remand, 533 F.2d 942, 945 (1976) (deeming issue mooted by filing of curative notice of appeal). Since the text of the Osternecks' July 31, 1985 notice, *see supra* note 3, expressly preserves an appeal against Barwick, Barwick Industries, Talley and Kellar, we must, by inference, conclude that the Osternecks chose to forego any appeal against E & W.

Moreover, to now permit the Osternecks to use their July 31 notice as a vehicle for an appeal against E & W would unfairly prejudice E & W. No doubt relying upon the Osternecks' failure to appeal the judgment in its favor, E & W has foregone any cross-appeal it might have had. A cross-appeal, had one been filed, could have raised many of the issues which we will address in connection with Case No. 85-8593. Indeed, when the Osternecks had earlier appeared to perfect an appeal against E & W by their March 1 notice of appeal, E & W promptly filed a notice of cross-appeal on March 15. Thus, it is evident that E & W has reasonably relied upon the fact that the Osternecks did not name them in their July 31 notice. To allow the Osternecks to now use that notice to raise an appeal against E & W would be inequitable.

Consequently, the issues the Osternecks seek to litigate against E & W are not preserved in Case No. 85-8593.

As our discussion makes plain, however, we do have jurisdiction over Case No. 85-8593, because the notices of appeal were filed after the district court entered its final judgment. The scope of these notices expressly embraces the appeals by Barwick Industries, E.T. Barwick, Talley and Kellar as well as the Osternecks' July 31, 1985 cross-appeal against those parties. Talley and Kellar have argued that the Osternecks' second notice specified only that portion of the final judgment relating to prejudgment interest and thus did not raise against them any issues other than the propriety of the prejudgment interest award expressly mentioned in the notice. We need not address this argument, however, because in this appeal against Talley and Kellar, the Osternecks have briefed only the prejudgment issue and have, consequently, abandoned any other assignments of error against Talley and Kellar. *Harris v. Plastics Manufacturing Co.*, 617 F.2d 438, 440 (5th Cir.1980). All parties agree that the July 31, 1985 notice was sufficient to permit the Osternecks to appeal from the district court's order which awarded prejudgment interest only on the federal securities claim and reduced by two-thirds the amount of interest requested by the Osternecks. Thus, all issues raised by the Osternecks in case No. 85-8593 against Talley and Kellar are properly before us, as well as the issues raised by the Talley and Kellar appeals, and we have jurisdiction to hear the case.[14]

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14. The Osternecks' cross-appeal also names Barwick Industries and E.T. Barwick and manifests an intent to appeal against

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B. *Case No. 85-8523*

This case presents a slightly different issue of appellate jurisdiction. On May 22, 1985, while the Osternecks' motion for prejudgment interest was pending before the district court, the district court ruled on E & W's motion for costs incurred while successfully defending against the Osternecks' action. In this order, the district court concluded that it was without authority to award fees for expert witnesses beyond the nominal statutory amount recoverable under 28 U.S.C. § 1821.[15] On June 21, 1985, E & W appealed from the district court's May 22 order.

Though orders awarding or denying costs are not ordinarily appealable, *Newton v. Consolidated Gas Co.*, 265 U.S. 78, 82-83, 44 S.Ct. 481, 482-83, 68 L.Ed. 909 (1924), when the refusal to tax an item of cost is not based upon an exercise of discretion but rather upon a district court's conclusion that it lacked the power to tax costs that order is appealable. *See McWilliams Dredging Co. v. Department of Highways*, 187 F.2d 61 (5th Cir.

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those parties. Nowhere in their briefs, however, have the Osternecks sought to raise any issue on appeal against Barwick Industries. Nor could they be deemed to have raised any beyond those asserted against Talley and Kellar, Barwick Industries' codefendants. Insofar as the Osternecks' briefs on appeal raise issues challenging the validity of the verdict in favor of E.T. Barwick, those issues are properly presented to us and we have jurisdiction to consider their merits as part of Case No. 85-8593. However, these issues have no merit. *See infra* n. 18.

15. This ruling accords with our circuit's prior decision in *Kivi v. Nationwide Mutual Ins. Co.*, 695 F.2d 1285 (11th Cir.1983). The Supreme Court has recently confirmed that our interpretation of the law is correct. *See Crawford Fitting Co. v. J.T. Gibbons*, — U.S. —, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987).

1951). Moreover, it is evident that an appeal respecting costs is an appeal of a collateral matter which does not seek reconsideration of substantive issues before the court. *Lucas*, 729 F.2d at 1301. Thus, our analysis above suggests that E & W's appeal is of a collateral matter and that a request for costs is not a motion under Rule 59(e).

This, however, does not dispose of the question. Simply because an order, such as an order taxing costs, is generally appealable it does not follow that any particular order is appealable. In this case, the order appealed from was entered prior to the district court's final disposition of all substantive issues in the case. This exactly reverses the typical procedure contemplated by Fed.R.Civ.P. 58, which provides that "[e]ntry of the judgment shall not be delayed for the taxing of costs."

By statutory authority, this court has jurisdiction only of appeals from final decisions of the district courts. 28 U.S.C. § 1291.[16] We may not hear appeals even from fully consummated decisions when they are but steps towards a final judgment into which they merge. We see no reason for concluding that the order taxing costs against the Osternecks was anything but such an intermediate step that merged into the subsequent July 9 final judgment of the district court and was appealable only at that time. Hence, E & W's appeal must be dismissed as an appeal from a nonfinal order of the district court.

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16. This statutory grant of appellate jurisdiction provides that:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts. . . .

28 U.S.C. § 1291.

Nor can E & W seek to avoid the finality rule by application of the *Cohen* doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (permitting appeal of certain nonfinal collateral issues). In the first place, it is not at all apparent that the *Cohen* doctrine can ever apply to notices of appeal filed during the pendency of a Rule 59 motion, such as the Osternecks' motion for prejudgment interest in this case. By its very terms, Rule 4(a)(4) mandates that "the time for appeal for *all* parties" shall run from the entry of an order granting or denying a Rule 59 motion. Fed.R.App.P. 4(a)(4) (emphasis supplied). Thus, one might conclude that the express terms of Rule 4(a)(4) render any notice of appeal filed during the pendency of a Rule 59 motion a nullity, no matter what that notice's otherwise appealable character.

We need not sweep so broadly in our ruling, however. Indeed we assume *arguendo* that the *Cohen* doctrine, if applicable, would validate a notice of appeal from a nonfinal collateral order filed during the pendency of a Rule 59 motion. However, it is evident that E & W's appeal of the order taxing costs does not meet the stringent requirements of the *Cohen* doctrine. In order for a nonfinal order to be appealable as a collateral matter under the *Cohen* doctrine, it must be clear that awaiting a timely appeal from the complete final judgment would effectively prevent review of the order in question. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457-58, 57 L.Ed.2d 351 (1978). *Cohen*, 337 U.S. at 546, 69 S.Ct. at 1225-26. No suggestion has been made, nor could one be, that the district court's order taxing costs would be unre-

viewable had E & W awaited final judgment before taking its appeal. Consequently, the *Cohen* doctrine is inapplicable.

For the foregoing reasons we conclude that the appeal in Case No. 85-8523 must be dismissed for want of jurisdiction because it is an appeal from a nonfinal order of the district court.

II. CASE NO. 85-8593—THE MERITS

Having concluded that we have jurisdiction only to determine the merits of Case No. 85-8593, we now turn our attention to the issues presented in that case. No. 85-8593 involves the issue raised by Talley and Kellar in their appeals,[17] and the prejudgment interest issue raised by the Osternecks in their cross-appeal.[18]

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17. Though E.T. Barwick and Barwick Industries filed notices of appeal, those appeals have been dismissed pursuant to Eleventh Circuit Rule 16(b). Hence, the judgment of the district court against Barwick Industries stands, and E.T. Barwick's appeal is abandoned.

18. The Osternecks also assert three claims challenging the verdict in favor of E.T. Barwick: (1) that the court improperly instructed the jury on the scienter requirement for aiding and abetting liability; (2) that the court improperly instructed the jury on the elements of a Rule 10b-5 claim; and (3) that no reasonable jury could have entered a verdict in Barwick's favor.

Any error in the jury instruction on aiding and abetting scienter was harmless. The jury found that Barwick was not primarily liable to the Osternecks under Rule 10b-5. The scienter requirement for 10b-5 is less than the proper scienter requirement for aiding and abetting liability. Accordingly, since the jury found no scienter for the primary liability, it could have found none for secondary liability either. *Cf. Cavalier Carpets, Inc. v. Caylor*, 746 F.2d 749, 758-59 (11th Cir.1984).

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On appeal, Talley argue: (1) that the district court improperly charged the jury with a four-year statute of limitations for the federal securities law claims; (2) that consequently, since prejudgment interest is not available under Georgia law, the award of prejudgment interest made by the district court under the federal securities law must be vacated; (3) that the district court improperly imposed upon him the burden of rebutting the Osternecks' bill of costs; and (4) that the district court erred in allowing his codefendants to cross-examine him when he testified at trial.

Appellant Kellar raises the following issues: (1) that the district court improperly charged a four-year statute of limitations on the federal securities claims; (2) that the district court erred in concluding that fraudulent concealment by third parties would toll the running of the federal securities statute of limitations against him; (3) that there was insufficient evidence to support a judgment that he was liable to the Osternecks on the federal securities claims; and (4) that there was insufficient evidence of scienter to support a judgment against him on the state common law fraud claims.

In reply the Osternecks contend: (1) that Talley and Kellar have waived their right to assign as error the district court's instruction to the jury applying the four-year statute of limitations to the federal securities claim; (2)

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We have closely examined the Osternecks' remaining allegations of error with respect to the verdict in Barwick's favor and find that they are without merit and warrant no discussion.

that any error in charging the jury on the federal securities statute of limitations was harmless; and on cross-appeal the Osternecks contend (3) that the district court abused its discretion in reducing by two-thirds the amount of prejudgment interest awarded to them.

A. *Statute of Limitations for the Federal Securities Claim*

Talley and Kellar assert that the district court committed several errors in determining the statute of limitations applicable to the Osternecks' federal securities claims. If Talley and Kellar had been successful in bringing themselves within the protection of the statute of limitations, thus barring the federal securities claims, the award of prejudgment interest would have to be vacated, since prejudgment interest is not available on the state law claims in this particular case. *See infra*, note 24.

The federal securities laws do not provide a specific statute of limitations for private rights of action asserted under §§ 10(b), 20 and Rule 10b-5. Thus, federal courts are required to borrow the most appropriate statute of limitations from the forum state. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 N. 29, 96 S.Ct. 1375, 1389 n. 29, 47 L.Ed.2d 668 (1976); *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1502 (11th Cir. 1986).

In this case, the district court originally concluded that the two-year statute of limitations provision of Georgia's Securities Act was applicable. *See Osterneck v. E.T. Barwick Industries, Inc.*, 79 F.R.D. 47, 50-51 (N.D.

Ga.1978) (applying Ga.CodeAnn. § 97-114 (1973).[19] Subsequently, however, the district court accepted the Osternecks' argument that Georgia's four-year statute of limitations for common law fraud was the proper statute of limitations to borrow. In reaching this conclusion, the district court relied upon the district court opinion of Judge Shoob in the *Friedlander* case. *See Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 595 F.Supp. 1442, 1443-52 (N.D.Ga.1984) (applying O.C.G.A. § 9-3-31 (1982),[20] *rev'd*, 788 F.2d 1500 (11th Cir.1986). Thus, when this case was sent to the jury, they were instructed that the suit was timely brought if it was initiated within four years of when the Osternecks knew or reasonably should have known through the exercise of due diligence that they had a cause of action against the defendants.

This instruction also had the effect of tolling the statute of limitations. Even under a four-year statute of limitations, the Osternecks might have been required to begin litigation by September 1973—4 years after the 1969 merger. The court's instruction permitted the jury to conclude that the suit was timely, however, if they found that the Osternecks did not know and through due dili-

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19. The Georgia Securities Act of 1957 is applicable to this case. The alleged fraud occurred in 1969 prior to Georgia's revision of its securities law in 1973. However, the two-year statute of limitations for securities violations in the 1973 law is identical to that in section 13 of the 1957 Act. *See McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 892 n. 9 (5th Cir.1979). The 1973 statute has since been recodified. O.C.G.A. § 10-5-14 (1982).

20. This four-year statute of limitations for fraud, codified in 1982, is identical to that in effect in 1969. Ga.Code Ann. § 3-1002.

gence could not have known of the existence of their cause of action before September 4, 1971—the date four years before they filed suit.

Appellants Talley and Kellar now seek a new trial, arguing first that a two-year statute of limitations should properly have been charged to the jury. Because Talley and Kellar failed to object to the jury charges as required by Fed.R.Civ.P. 51, our review is restricted to one of plain error. Since we conclude that the district court's charge was not plainly erroneous, we reject the appellants' assertion that a new trial is necessary.

The law in this circuit is clear. Pursuant to Fed.R.Civ.P. 51, one who wishes to challenge on appeal a district court's instruction to the jury on the ground that it was an erroneous statement of the law must have objected to the instruction at trial. *See Kenney v. Lewis Revels Rare Coins, Inc.*, 741 F.2d 378, 382 (11th Cir.1984). One may not rely on the objections made by co-parties to the action, but, rather must expressly adopt a co-parties objection as his own. *Id.* In the obsence of an objection, a defendant is deemed to have waived his right to assign as error the district court's jury charge. We will depart from this rule only in narrow circumstances when an error is "so fundamental as to result in a miscarriage of justice," *see Barnett v. Housing Authority*, 707 F.2d 1571, 1580 (11th Cir.1983) (quoting *Patton v. Archer*, 590 F.2d 1319, 1322 (5th Cir.1979)), or when the district court's instruction amounts to plain error, *see Barnett*, 707 F.2d at 1581 n. 18; *Johnson v. Bryant*, 671 F.2d 1276, 1281 (11th Cir.1982). *But see Williams v. Butler*, 746 F.2d 431, 443-44 (8th Cir.1984).

In the instant case, both Talley and Kellar failed to object to the district court's statute of limitations charge. Indeed, they were not even represented at trial having, by their own stipulation, been excused from attending the lengthy proceedings. Thus, though their codefendants E & W and E.T. Barwick did object to the jury instruction, Talley and Kellar did not adopt these objections. Consequently, they have failed to preserve the issue for review on appeal unless the instruction was plainly erroneous.

Nor will it do for Talley and Kellar to argue that the district court's decision permitting them to be absent from trial somehow excuses them from their obligations pursuant to Rule 51. This would create the perverse result of according greater lenity to those who do not appear at trial than to those who do appear but merely neglect to adopt the objections of their codefendants.

Moreover, both Talley and Kellar were fully aware that the district court was reconsidering its earlier determination to charge a two-year statute of limitations. They were both served with voluminous memoranda on the subject submitted by the Osternecks and E & W, yet neither offered any reply of their own.[21] Thus, Talley and Kellar had ample opportunity to place their objections to the jury charge on the record as required by Rule 51. By failing to do so, they limited their own rights on appeal

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21. Moreover, had Talley and Kellar been present at trial they might have sought a special verdict from the jury assessing liability under a two-year statute of limitations. The record indicates that the district court would have been receptive to such a suggestion.

and may only receive a new trial if the jury instruction amounted to plain error.[22]

In the circumstances of this case, we cannot conclude that the trial court was plainly erroneous in charging the jury as it did. As the Supreme Court has recognized, a "court's interpretation of the contours of [an area of legal uncertainty] hardly could give rise to plain judicial error [when] those contours are . . . in a state of evolving definition and uncertainty." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256, 101 S.Ct. 2748, 2754, 69 L.Ed.2d 616 (1981); *see also Barnett*, 707 F.2d at 1581 n. 18; *Black v. Stephens*, 662 F.2d 181, 184 n. 1 (3d Cir.1981), *cert. denied*, 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982).

The district court's jury instructions in this case were rendered at a time when the law concerning which statute of limitations to borrow from the forum state was uncer-

22. Talley and Kellar can find no comfort in our decision in *Lang v. Texas & P. Ry. Co.*, 624 F.2d 1275 (5th Cir.1980). There we concluded that the failure to object to a jury charge "may be disregarded if the party's position has previously been made clear to the court and it is plain that a futher objection would be unavailing." *Id.* at 1279 (citation omitted). Appellants have satisfied neither prong of this requirement. Though their general position on the statute of limitations issue had been made clear to the court, neither Talley nor Kellar had addressed the immediate issue presented—the applicability of the then recently decided *Friedlander* district court opinion. Moreover, it could not have been plain that an objection would prove unavailing. The district court had previously chosen to apply a two-year statute of limitations and might easily have concluded that the *Friedlander* decision was distinguishable or that its earlier decision should not, for reasons of equity, be disturbed. Thus, the limited exception to Rule 51 contemplated in *Lang* is not applicable to this case.

tain. Applying a case-by-case analysis, the district court followed an earlier decision of the *Friedlander* district court, 595 F.Supp. at 1443-52, which chose a four-year statute of limitations in a similar securities case fraud case.

It was not until several months later that the Supreme Court, in *Wilson* v. *Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), revised the method by which courts should choose the appropriate statute of limitations to borrow and determined that lower courts must analyze the question on a statute-by-statute basis. Moreover, it was not until May 1986, over one year later, that this court first had occasion to apply the *Wilson* standard to a case involving the appropriate statute of limitations to be borrowed for federal securities claims. In *Friedlander*, 788 F.2d at 1507-09, we concluded that for all federal securities cases the appropriate statute of limitations to borrow is that of the Georgia Securities Act. Thus, though *Friedlander* now makes clear that the district court should properly have charged a two-year statute of limitations (since that is now and was in 1969 the statute of limitations in the Georgia Securities Act), we cannot say that the court's erroneous four-year charge was plain judicial error.[23] Given the uncertain and evolving contours of the law regarding the appropriate statute of limitations to borrow, we think the district court was

23. It follows, *a fortiori*, that the error was not so fundamental as to result in a miscarriage of justice.

reasonable in its erroneous conclusion that a four-year statute of limitations should apply.[24] For these reasons,[25]

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24. Nor should the resolution we reach in this case be considered an inequitable one. Had a new trial been required because of an improper jury charge, it is likely, *see infra* note 31, that the only issue which such a new trial would resolve is the question of prejudgment interest. Though the damage judgment against Talley and Kellar was independently supported by the jury's finding that they were liable for common law fraud, prejudgment interest on the fraud judgment would not be available to the Osternecks because they failed to comply with Georgia's statutory notice and demand requirement for prejudgment interest on unliquidated damages. *See* O.C.G.A. § 51-12-14. It was only this oversight by the Osternecks' attorneys which makes the federal statute of limitations question relevant; had the proper notice been filed an award of prejudgment interest under Georgia law would have provided an independent ground for affirmance and permitted us to pretermit the statute of limitations question. Thus, in some sense, the "inequity" of holding Talley and Kellar to the stringent requirement of Rule 51 is balanced by the "inequity" inherent in the stringent requirement of O.C.G.A. § 51-12-14 whose operation is all that renders the statute of limitations question relevant in the first place.

25. An additional ground for decision suggests itself. In *Saint Francis College v. Al-Khazraji*, — U.S. —, 107 S.Ct. 2022, 2025-26, 95 L.Ed.2d 582 (1987), the Supreme Court concluded that changes in a statute of limitations made pursuant to the commands of *Wilson* should not be applied retroactively if the change would overrule clear circuit precedent upon which the complaining party was entitled to rely and if the retroactive application would be inconsistent with the purpose of the underlying substantive statute. *Cf. Goodman v. Lukens Steel Co.*, — U.S. —, — - —, 107 S.Ct. 2617, 2620-22, 96 L.Ed. 2d 572 (1987) (applying *Wilson* retroactively where circuit precedent was unclear. Plainly our decision in *Friedlander* revised prior clear circuit precedent. *See McNeal*, 598 F.2d at 892. However, the parties have not briefed the issues of justifiable reliance and consistency with the purposes of the underlying Securities Act. Thus, we decline to rest our decision upon the *St. Francis* analysis and content ourselves with merely noting that it tends to support our conclusion that no plain error has occurred.

Talley and Kellar's assertion that the erroneous jury charge entitles them to a new trial is without merit.[26]

Kellar also argues that the district court erred in instructing the jury that the statute of limitations was tolled until such time as the Osternecks knew or through due diligence should have known of the existence of their cause of action. This instruction, Kellar contends, improperly allowed the fraudulent concealment of third parties, such as Talley and Barwick Indsutries, to be attributed to him. Instead, Kellar argues, the four-year statute of limitations should not be tolled against him because he did not do any fraudulent acts which would have concealed the Osternecks' cause of action. Were we to accept Kellar's argument the statute of limitations would have expired four years after the merger and the Osternecks' suit against Kellar would be barred.

Kellar, however, is mistaken.[27] Though the limitations period for a securities claim is borrowed from the forum state "the date when a claim accrues so as to trigger the state law limitation period is matter of federal law." *Sargent v. Genesco, Inc.*, 492 F.2d 750, 758 (5th Cir.1974). Under federal law the statute of limitations for a fraud action may be equitably tolled. *See Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946) (tolling limitations period in action under Federal

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26. Our resolution of the issue in this matter makes it, of course, unnecessary to consider the Osternecks' argument that any error in charging a four-year limitation period was harmless.

27. Consistent with our conclusion above, we review this instruction under the plainly erroneous standard. We conclude, however, that the district court instruction was a correct statement of the law and would have been sustained under any standard of review.

Farm Loan Act). This equitable tolling doctrine is plainly available to federal securities law plaintiffs. *Schaefer v. First National Bank*, 509 F.2d 1287, 1295-96 (7th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S.Ct. 1682, 48 L.Ed.2d 186 (1976). Equity mandates that the statute of limitations be tolled until the fraud is discovered, *Sargent*, 492 F.2d at 758, provided that the plaintiff injured by fraud "remains in ignorance of it without any fault or want of diligence or care on his part," *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123, 128 (7th Cir.1972) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1875)). Since the jury instructions plainly charged the jury with this exact standard, Kellar's contention that the district court erred is without merit.[28]

B. *Other Federal Issues*

Several other issues pertaining to the federal securities judgment have been raised by the parties. First, appellant Kellar contends that there was insufficient evi-

28. Kellar attempts to distinguish this line of cases, arguing that none involve situations where the existence of the cause of action was concealed by third parties and not by the defendant who seeks to take advantage of the statute of limitations. However, a well-established line of cases articulates an equitable tolling doctrine that does not depend upon affirmative concealment after the initial fraud. Where, as in this case, concealment is inherent in the nature of the wrong done, *cf. Hobson v. Wilson*, 737 F.2d 1, 33-36 (D.C. Cir.1984) (characterizing such acts as self-concealing fraud), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985), all that is necessary to toll the statute is a plaintiff's due diligence in seeking to discover the fraud, *id.* at 34 n. 103 (collecting cases applying this rule). *See also, Trecker v. Scag*, 679 F.2d 703, 708 (7th Cir.1982). Since only a demonstration of due diligence is necessary and since the Osternecks have made such a demonstration to the jury's satisfaction, the requirements for tolling the statute of limitations against Kellar have been satisfied.

dence to support the judgment against him. After carefully reviewing the record, we conclude that there was sufficient credible evidence of Kellar's direct liability to allow a jury to enter judgment against him,[29] and that this issue warrants no further discussion.

Appellant Talley raises two additional issues on appeal: (1) whether the district court improperly shifted to him the burden of rebutting the Osternecks' bill of costs; and (2) whether the district court erred in permitting his codefendants to cross-examine him at trial. We have closely examined these questions and find that the assignment of error are without merit and warrant no discussion.

The final federal issue posed is the Osternecks' contention that the district court abused its discretion in awarding prejudgment interest only in the amount of $945,512.85.[30] In making this award, the district court exercised two forms of discretion. First, the court chose to award prejudgment interest at the rate of 7% annually, not compounded. This required a total

29. Kellar also contends that there was insufficient evidence to support a judgment of liability against him on the theories that he aided and abetted Barwick Industries' securities fraud or that he was a controlling person in Barwick Industries within the meaning of the securities law. Because we conclude there was sufficient evidence to support a finding of direct liability, we need not consider these issues.

30. Talley and Kellar do not challenge the amount of the award. Their sole contention in this regard is that the award of prejudgment interest must be vacated because the judgment against them on the federal securities claims was based upon an improper jury instruction with respect to the statute of limitations. We have, however, rejected their contention that the federal judgment was improper. Hence, Talley and Kellar's challenge to the award of prejudgment interest must also be rejected.

interest award of over 2.8 million dollars. Though this interest award exceeded the principal judgment of $2,632,234, it was nonetheless, the smallest interest award the trial court could have rendered. Other methods of calculation, for example compounding the principal in three-month certificates of deposit for the entire period of this litigation, would have produced interest awards of over 7 million dollars.

In its second exercise of discretion, the district court then determined that its initial interest award of some 2.8 million dollars should be reduced by two-thirds. This reduction reflected the district court's conclusion that: (1) an interest award in excess of the principal sum would be punitive; and (2) that a substantial portion of the delay in bringing this suit to a conclusion could be attributed either to actions the plaintiffs had taken or to delays inherent in the federal judicial system. Thus, the district court concluded that the defendants, having been responsible for no more than one-third of the delay in bringing this suit to trial, were responsible for only one-third of the prejudgment interest which might be awarded. Consequently, the district court awarded prejudgment interest on the federal securities claim in the amount of $945,512.85. The Osternecks challenge only this second exercise of discretion.

It is clear that whether "prejudgment interest should be awarded on a damage recovery in a [federal securities] action is a question of fairness resting within the District Court's sound discretion." *Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), *cert. denied*, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973). Moreover, in awarding prejudgment interest, the district court must insure that the award is

not punitive in nature. *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191-92 (2d Cir.1969), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970). Finally, because the award of prejudgment interest is compensatory rather than punitive, the award must be "tempered by an assessment of the equities." *Id.* at 1191. It is apparent to us that the factors relied upon by the district court are precisely the sorts of equitable considerations which should be evaluated in making a prejudgment interest award. Therefore, we cannot conclude that the district court abused its discretion in awarding the Osternecks only $945,512.85 in prejudgment interest.

For the reasons stated in the foregoing analysis, the federal securities judgment in the amount of $2,632,234 entered in favor of the plaintiffs and against Barwick Industries, Kellar and Talley with prejudgment interest in the amount of $945,512.85 is, in all respects, affirmed.[31]

III. CONCLUSION

In sum, the appeals in Case Nos. 85-8165 and 85-8523 are DISMISSED for want of appellate jurisdiction. The judgment in Case No. 85-8593 is AFFIRMED.

AFFIRMED in part, and appeals DISMISSED in part.

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31. The federal securities judgment which we affirm includes prejudgment interest. Thus, the total award received by the Osternecks on their federal claim exceeds the amount they were awarded based upon their state common law fraud judgment. Consequently, because a second recovery on the state law claims would not be possible, we need not address any issues presented by the challenge to the state law judgment and we expressly decline to decide them. However, see *supra* note 24.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-8165

MYLES OSTERNECK, et al.,
Plaintiffs-Appellants,
Cross-Appellees,

versus

E.T. BARWICK INDUSTRIES,
Defendant,

E.T. BARWICK,
Defendant,

M.E. KELLAR,
Defendant-Appellant,
Cross-Appellee,

BUFORD TALLEY,
Defendant-Appellant,
Cross-Appellee,

ERNST & WHINNEY,
Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion August 31, 11 Cir., 1987, — F.2d —)
(Filed October 19, 1987)

Before HATCHETT and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:
/s/ R. L. Anderson
United States Circuit Judge

ORD-42

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 85-8165

MYLES OSTERNECK, et al.,

Plaintiffs/Appellants,

v.

EUGENE BARWICK and ERNST & WHINNEY,

Defendants/Appellees,

B.A. TALLEY, M.E. KELLAR, and
E.T. BARWICK INDUSTRIES, INC.,

Defendants/Appellants,

v.

MYLES OSTERNECK, et al.,

Plaintiffs/Appellees/
Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF GEORGIA

STIPULATION OF DEFENDANT/APPELLANTS
KELLAR AND TALLEY THAT PLAINTIFFS'
MARCH 15, 1985 NOTICE OF CROSS-APPEAL
WAS TIMELY FILED AND THAT THIS
COURT HAS JURISDICTION

It is the position of Defendant/Appellants Buford A. Talley ("Talley") and M.E. Kellar ("Kellar") that the Cross-Appeal filed by the Plaintiffs/Appellees/Cross-Appellants (the "Osternecks") on March 15, 1985 in the above-styled action was timely filed in accordance with the Federal Rules of Appellate Procedure. Defendant/

Appellants Talley and Kellar do not object to and stipulate that this Court has jurisdiction of the Cross-Appeal filed by the Osternecks on March 15, 1985.

This 6th day of May, 1985.

STIPULATED TO BY:

/s/ R. Hal Meeks, Jr.
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Georgia State Bar No. 500825
Attorney for Defendant/Appellant
Buford A. Talley

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/s/ Susan Hoy by RHN
by/express permission
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M. E. Kellar
